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IN SUPREME COURT, STATE OF MINNESOTA

No. 36056

LEO ARENS AND EUGENE FRISETTE,
Plaintiffs-Appellants,

vs.

THE VILLAGE OF ROGERS, A MUNICIPAL CORPORATION,
Defendant-Respondent

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Minnesota Supreme Court entered in this cause.

Opinions Below

The memorandum opinion of the District Court, Hennepin County, Minnesota is not reported. A copy of that opinion is attached hereto as Appendix B. The opinion of the Minnesota Supreme Court is reported at 61 N. W. 2d 508. A copy of its opinion is attached hereto as Exhibit A.

Jurisdiction

The judgment of the Minnesota Supreme Court was entered December 16, 1953. A petition for appeal is presented to the Chief Justice of the Minnesota Supreme Court con-

currently herewith, that is on March 11, 1954. The basis of this suit is plaintiffs' claim that the Minnesota statute quoted below denies plaintiffs the Due Process of Law guaranteed by the Fourteenth Amendment, in that such statute has been applied to permit establishment of a municipal liquor store solely for municipal revenue purposes and to require the ouster of plaintiffs from their private liquor businesses. The Minnesota Supreme Court overruled this claim and decided in favor of the validity of such statute. There was thus drawn in question the validity of a statute of Minnesota on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. The jurisdiction of the Supreme Court over this appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *McCollum* v. *Board of Education*, 333 U. S. 203, 206 (1948); *La Crosse Tel. Corp.* v. *Wis. Board*, 336 U. S. 18 (1949).

Plaintiffs raised the federal question of denial of Due Process of Law guaranteed by the Fourteenth Amendment at the commencement of their suit in their complaint. The Minnesota Supreme Court expressly considered and rejected this federal claim, as appears from its opinion (61 N. W. 2d at 517-518; App. A):

> "Plaintiffs further contend that the refusal of the village of Rogers to renew their liquor licenses in order to establish a municipal liquor store deprived them of their liberty and property without due process of law in violation of U. S. Const. Amend. XIV, and Minn. Const. art. 1, Sec. 7.
>
> • • • • • • •

> While plaintiffs do not quarrel with the unquestioned power of defendant to establish a municipal liquor store pursuant to the police power as a method of regulating the liquor business, it is their position that the village of Rogers established the municipal liquor store in question solely for revenue purposes. This they contend is not a reasonable justification for putting a person out of business and is violative of the due process clauses of both the state and federal constitutions. Thus they argue that the trial court erred in granting defendant summary judgment because they should be allowed at trial to produce evidence of the revenue seeking motives of defendant's village council in authorizing the municipal liquor store. However, in view of the well-established rule that the motives of a legislative body in enacting any particular legislation are not the proper subject for judicial inquiry, their position, in our opinion, is untenable. * * *"

The Court in support of the last quoted sentence, then quoted from *Higgins* v. *Lacroix,* 119 Minn. 145, 148, 137 N. W. 417 (1921), which in turn quotes from *Soon Hing* v. *Crowley,* 113 U. S. 703, 710 (1885). The Court then overruled plaintiffs' claim of denial of Due Process of Law guaranteed by the Fourteenth Amendment.

Questions Presented

1. Whether the ouster of plaintiffs from their private businesses by the Minnesota liquor statute through establishment by defendant of a municipal liquor monopoly under such statute solely for municipal revenue purposes denied plaintiffs the Due Process of Law guaranteed by the Fourteenth Amendment.

2. Whether defendant's ouster of plaintiffs from their private businesses by establishing by ordinance a municipal liquor monopoly solely for municipal revenue purposes denied plaintiffs the Due Process of Law guaranteed by the Fourteenth Amendment.

3. Whether plaintiffs were denied the Due Process of Law guaranteed by the Fourteenth Amendment by rendition of a summary judgment against them, which precluded their showing by evidence that defendant ousted them from their private businesses by establishing a municipal liquor monopoly under the Minnesota liquor statute solely to provide an additional source of municipal revenue and thereby destroyed their businesses without Due Process.

Statutes Involved

The pertinent portions of the Minnesota statute authorizing establishment of municipal liquor stores in certain municipalities, and providing that no private liquor store can co-exist with a municipal liquor store, are quoted below. They appear in Ch. 340, 2 Minn. Stat. 1949, at pp. 2645, 2648, and 2652.

Sec. 340.07, Subd. 5:

> " 'Exclusive liquor store' is an establishment used exclusively for the sale of intoxicating liquor, cigars, cigarettes, all forms of tobacco, non-intoxicating malt beverages and soft drinks at retail, either on sale or off sale, or both; provided, that lunches may be sold in a liquor store located in a village containing less than 500 inhabitants and situated in any county having a population according to the last federal census of not less than 34,000 nor more than 35,000, and having not less than 24, nor more than 25, full and fractional townships. It shall be under control of an individual owner or manager and, if located in municipalities other than cities of the first, second, and third class, it may be owned and operated by the municipality as the governing body thereof shall direct. * * *" (p. 2645).

Sec. 340.11, Subd. 10:

> " 'On sale' licenses may be issued for the sale of intoxicating liquors in hotels, clubs, restaurants and establishments for the sale of 'On sale' liquors exclu-

sively in cities of the first, second, and third class and villages of over 10,000 inhabitants, and in cities of the fourth class where such cities have a population in excess of 3,000 persons and are adjacent to cities of the third class. Such licenses may be issued in cities of the fourth class, and other villages and boroughs for such sale of intoxicating liquor in hotels, clubs or exclusive liquor stores, which exclusive liquor stores the governing body of such municipalities may establish or permit to be established for dispensation of liquor either 'On sale' or 'Off sale', or both. In cities and villages having over 5,000 and not more than 10,000 population the municipality may license 'On sale' in restaurants in lieu of the establishment of exclusive liquor stores." (p. 2648).

Sec. 340.13, Subd. 1:

"* * * No retailer's 'on sale' or retailer's 'off sale' license shall be directly or indirectly issued with respect to any place in any municipality maintaining an exclusive liquor store nor to any person or for any place for which a license of another class has been granted. * * *" (p. 2652).

The Minnesota statutory provision for purchase of the properties of private liquor establishments prior to establishment of the municipal monopoly is contained in Ch. 340, 2 Minn. Stat. 1949, pp. 2649-50. It is Sec. 340.11, Subd. 16, which was held unconstitutional by the Minnesota Supreme Court in the instant case as providing for the expenditure of public funds for a private purpose in violation of the Minnesota Constitution (61 N. W. 2d at 519; App. A). Sec. 340.11, Subd. 16, provides:

"No municipality shall engage in the sale of intoxicating liquors to the exclusion of private interests without first purchasing the stock, equipment and other tangible personal property of such private liquor establishments and reimbursing the private owner or owners for the property thereby divested or rendered unpro-

ductive therein by the act of such municipality in the creation of said municipal liquor store; provided, that this subdivision shall not alter the act of any municipality in the past nor shall the same be retroactive as to property rights heretofore divested or rendered unproductive by any act of any municipality in the creation of a municipal liquor store prior to the passage of Laws 1945, Chapter 417. In the event that no agreement can be reached between said interested parties as to the value of the stock, equipment, and tangible personal property affected by said act of such municipality or other governing body, then, and in that event, the same shall be submitted to arbitration in accordance with the provisions of Minnesota Statutes 1941, Chapter 572." (pp. 2649-50).

Statement

For many years plaintiffs were licensed by defendant Village of Rogers to sell liquor both "on-sale" and "off-sale" and engaged in that business in their respective establishments in Rogers. Plaintiffs always operated their establishments in an orderly, decent and legal manner. They never committed or permitted commission of any violations of law on their premises. Their establishments never constituted police or policing problems.

Under the Minnesota statute licenses for liquor establishments are issued annually. Plaintiffs licenses were due to expire in normal course on June 30, 1950. Prior to their expiration, defendant decided to establish a municipal liquor store. The Minnesota statute (Sec. 340.13, Subd. 1, *supra*) provides that private liquor establishments cannot exist in a municipality having a municipal liquor store. The establishment of a municipal liquor store therefore means a governmental monopoly. Defendant denied plaintiffs' applications for renewal of their licenses. Defendant by ordinance passed under the Minnesota statute (Sec. 340.07, Subd. 5 and Sec. 340.11, Subd. 10, *supra*) established and

commenced operating its municipal liquor store the day after the plaintiffs' licenses expired, namely, July 1, 1950. The sole reason for defendant's establishment of a municipal liquor store was to procure additional municipal revenue. Defendant refused to purchase the "stock, equipment and other tangible personal property" (except a small portion thereof) of plaintiffs' private liquor establishments, although such purchase is a condition of establishment of a municipal liquor monopoly under the Minnesota statute (Sec. 340.11, Sub. 16, *supra*).

Plaintiffs, both as taxpayers and individuals, brought suit in the District Court of Minnesota against defendant. Plaintiffs' case was that defendant's establishment under the Minnesota statute of its municipal liquor monopoly, requiring the ouster of plaintiffs from their private liquor businesses, is unconstitutional under the Minnesota and United States Constitutions. Plaintiffs' federal claim was that the statute as applied denies the Due Process of Law guaranteed by the Fourteenth Amendment. Plaintiffs also claimed that in any event they had the right to the protection of the Minnesota statute (Sec. 340.11, Subd. 16, *supra*) requiring purchase of the properties of private liquor establishments before creation of the municipal liquor monopoly. Defendant moved for summary judgment. The motion was made and heard on the pleadings and argument of counsel only. The District Court granted the motion. The District Court held that plaintiffs were not entitled to have their properties purchased because it considered the statutory provision for purchase unconstitutional under the Minnesota constitution as providing for the expenditure of public funds for a private purpose. The District Court also held that plaintiffs were not denied Due Process of Law.

The Minnesota Supreme Court on appeal reached the same result. Respecting the question of denial of Due Process of Law, guaranteed by the Fourteenth Amendment, it

held that there was no error in granting summary judgment for defendant because plaintiffs in any event would be foreclosed from proving that establishment of the municipal liquor monopoly was solely for revenue purposes. Such foreclosure from showing the facts was deemed to follow because of the rule "that the motives of a legislative body in enacting any particular legislation are not the proper subject for judicial inquiry." (61 N. W. 2d at 518; App. A).

The Questions Are Substantial

So far as plaintiffs can find, this is the first time in our history that an American court has upheld the establishment of a government-owned liquor store when the store was established solely for revenue purposes.

Similarly, it is the first time an American court has upheld a government-owned monopoly of any type, established solely for revenue purposes, which required the ouster of private business.

The cases upholding establishment of state or municipal liquor stores for *police purposes* are beside the point. Compare *State* v. *Aiken*, 42 S. C. 222, 232, 20 S. E. 222, 224-5 (1894), upholding state liquor monopoly as a police measure, with *McCullough* v. *Brown*, 41 S. C. 220, 245, 19 S. E. 458, 472 (1894) holding state liquor monopoly under an earlier statute invalid as a revenue measure. Likewise beside the point are the cases upholding the governmental competition with private business. See e.g. *Jones* v. *City of Portland*, 245 U. S. 217 (1917) (municipally owned fuel yard); *Green* v. *Frazier*, 253 U. S. 233 (1920) (state engaged in various "private" enterprises); *Standard Oil Co.* v. *Lincoln*, 275 U. S. 504 (1927) (city in filling station business).

The case at bar was argued and submitted to the courts below, and decided by them, on the factual basis that defendant's establishment of its municipal liquor store was

solely for revenue purposes. The Minnesota Supreme Court made this clear in its opinion:

> " . . . it is [plaintiffs'] position that the village of Rogers established the municipal liquor store in question solely for revenue purposes. This [plaintiffs] contend is not a reasonable justification for putting a person out of business and is violative of the due process clauses of both the state and federal constitutions. Thus [plaintiffs] argue that the trial court erred in granting defendant summary judgment because they should be allowed at trial to produce evidence of the revenue seeking motives of defendant's village council in authorizing the municipal liquor store. . . . (61 N. W. 2d at 518; App. A).

Under the Minnesota statute (Sec. 340.13, Subd. 1, *supra*) establishment of a municipal liquor monopoly puts private liquor stores out of business. In this case the Minnesota Supreme Court struck down the statutory provision for purchase of the properties of private liquor stores ousted by the municipal monopoly on the state ground that this required an expenditure of public funds for a private purpose (61 N. W. 2d at 519-522; App. A). This case therefore presents (i) the establishment of a municipal liquor monopoly solely for municipal revenue purposes, (ii) requiring the ouster of plaintiffs from their private businesses, (iii) without compensation to plaintiffs.

This presents a substantial and significant federal question of general importance. Of course earlier Due Process decisions restricting the power of a state to curtail the right to engage in private business have been largely discredited by subsequent decisions recognizing a wide area of legislative discretion in economic legislation. Thus the philosophy of the majority in *Adams* v. *Tanner*, 244 U. S. 590 (1917) (statutory prohibition on private employment agencies held violative of Due Process) and *New State Ice Co.* v. *Liebman*,

285 U. S. 262 (1932) (statute barring new entrants into ice business where existing facilities sufficient held violative of Due Process), has largely been replaced by the philosophy of Justices who dissented in those cases, Justices Holmes, Brandeis, Clark and Stone. Cf. *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U. S. 525, 535 (1949). And since *Green* v. *Frazier*, 253 U. S. 233 (1920) there has never been any serious federal question of the power of a state to engage in the sale or supplying of necessary services or goods in competition with private enterprise thought to be rendering less than satisfactory service.

But never has it been intimated by this Court, nor prior to the instant decision by any court in the United States, that the state may oust the private owners of a profitable business and create for itself a monopoly in that business solely for the purpose of increasing governmental revenue. That is precisely what has here been done, and without compensation to the ousted businessmen. It seems no exaggeration to say that the acceptance of this as consistent with Due Process would mean the end of our present conception of government. For this means that the government, instead of serving primarily to protect private personal and property rights, would be free to destroy these rights and to take over and operate for profit any private business thought to be profitable. Whether this can be done certainly presents a substantial federal question. It is no answer to say that the liquor business is *sui generis*. It is, from the viewpoint of the police power. That has always been conceded by plaintiffs. But this is not a police power case. It is a case of municipal ouster of private liquor dealers in order to secure a monopoly for revenue purposes.

Possibly realizing the extremity of the principle it upheld, the Minnesota Supreme Court attempted to justify the result by indirection. The justification is that "the motives

of a legislative body in enacting any particular legislation are not the proper subject for judicial inquiry." In its opinion the term "particular legislation" refers to the ordinance of the defendant establishing the municipal liquor store (61 N. W. 2d at 518; App. A). Thus the Court upheld the statute, applied here through this ordinance, against the claim that this application denies Due Process, because of a supposed rule against inquiry into legislative motivation. In so ruling the Court relied upon its previous holding in *Higgins* v. *Lacroix*, 119 Minn. 145, 137 N. W. 417 (1921) involving a municipal ordinance requiring a $200 annual license fee for operation of a movie theatre in a village of about 1,000 population. The Court there held inadmissible testimony of admissions by individual members of the village council tending to show that their motive in fixing the license fee was to obtain funds for a depleted village treasury. *Higgins* v. *Lacroix* in turn invoked a decision of this Court, *Soon Hing* v. *Crowley*, 113 U. S. 703 (1885). The latter involved an attack on an ordinance prohibiting certain night work in public laundries. One ground of the attack was that the ordinance had been adopted because of antipathy against Chinese residents. This Court struck down the attack, noting that there was nothing in the ordinance or the record of its enactment which tended to sustain the ground mentioned. In this connection this Court stated that courts cannot inquire into the motives of legislators in passing enactments "except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation" (113 U. S. at 710). The exception controls the case at bar, where it is not only inferrible but demonstrable by objective evidence without regard to subjective motivation that revenue was the sole reason for establishment of the municipal liquor monopoly by the defendant.

This Court has not been reluctant to look behind a state statute to the realities of its application and use. It has looked to the necessary operation and effect of a statute in the light of the factual background of its application to ascertain the legislative purpose. See e. g. *Toomer* v. *Witsell,* 334 U. S. 385, 395-99 (1948); *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10, 13 (1928); *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 597-8 (1923). It has also looked to the manner in which a statute has been applied by administrative bodies or subordinate governmental agencies to ascertain whether a statute, valid on its face, is being applied in such a manner as to defeat constitutional rights. See e. g. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Patton* v. *Mississippi,* 332 U. S. 463, 465 (1947). In most of these cases this Court considered objective evidence demonstrating discriminatory purpose (*Yick Wo* v. *Hopkins, supra* at 373; *Patton* v. *Mississippi, supra* at 468) or improper legislative purpose (*Toomer* v. *Witsell, supra* at 397, particularly note 30; *Foster Packing Co.* v. *Haydel, supra,* at 10, 13) in finding that the state had violated constitutional limitations.

Plaintiffs' claim in this case is grounded upon a similar improper purpose demonstrable by objective evidence. Plaintiffs claim is that defendant village used the statute, valid on its face, in such a manner as to deprive them of their constitutional rights by ousting them from their businesses and establishing a municipal liquor monopoly for revenue purposes only. But plaintiffs were denied the right to prove this improper and unconstitutional use of the statute by the unwarranted assumption of the court below that their case was grounded upon an inquiry into subjective motivation. By this unwarranted assumption the Minnesota Supreme Court denied to plaintiffs a hearing on the merits of their claim, and thereby precluded them from showing a denial of Due Process.

Plaintiffs' case is that the sole purpose of the Village of Rogers in establishing a municipal liquor monopoly was to secure additional revenue. The Minnesota Supreme Court noted that plaintiffs sought to be allowed at the trial to produce evidence to show that purpose (61 N. W. 2d at 518; App. A). Yet it denied plaintiffs that right. Assuming that a state court faced with a federal question may invoke a rule precluding inquiry into a subjective motivation of legislators, it cannot by *a priori* assumption that all evidence to be offered will be inadmissible under such rule, foreclose establishment by admissible evidence of the sole and real reason for municipal action. To do so where the real reason is interdicted by the Federal Constitution, is to overcome the paramount law by indirection. The judgment below therefore presents the additional substantial federal question whether preventing plaintiffs by summary judgment against them from showing that their ouster from their businesses without compensation was solely to give the municipality a source of revenue, denies plaintiffs due Process of Law.

The questions presented are obviously of general importance. They are substantial federal questions.

Respectfully submitted,

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APPENDIX "A"

No. 129

Hennepin County

Christianson, J. Took no part, Thomas. Gallagher, J.

36056

LEO ARENS AND EUGENE FRISETTE, *Appellants,*

vs.

VILLAGE OF ROGERS, *Respondent*

Endorsed, Filed December 4, 1953, Grace Kaercher Davis, Clerk Minnesota Supreme Court.

SYLLABUS

1. A taxpayer of a municipality which is engaged in the operation of a municipal liquor store may, under the uniform declaratory judgments act, M. S. A. c. 555, challenge the constitutionality of the statutes authorizing the establishment of municipal liquor stores where the operation of the municipal liquor store has resulted in a financial loss to the municipality.

2. M. S. A. 340.07, subd. 5, and 340.11, subd. 10, authorizing the establishment of municipal liquor stores in cities, villages, and boroughs of not over 10,000 population are not invalid as special legislation prohibited by Minn. Const. art. 4, Sec. 33.

3. The refusal of defendant village to renew plaintiffs' private liquor licenses in order to establish an exclusive "on sale" and "off sale" municipal liquor store did not deprive plaintiffs of their liberty and property without due process of law in violation of U. S. Const. Amend. XIV, and Minn. Const. art. 1, Sec. 7.

4. M. S. A. 340.11, subd. 16, which requires municipalities establishing municipal liquors to purchase the stock, equipment, and other tangible personal property of pri-

vate liquor establishments thereby divested of their business, provides for the expenditure of public funds for private purposes and is, therefore, unconstitutional.

Affirmed.

OPINION

CHRISTIANSON, *Justice:*

Action was brought by plaintiffs on behalf of themselves and all other taxpayers of the village of Rogers in the Hennepin county district court on December 4, 1951, seeking: (1) A declaratory judgment to the effect that the authorization and establishment of municipal liquor stores in villages and cities of the fourth class, including the village of Rogers, pursuant to M. S. A. 340.07, subd. 5, and 340.11, subd. 10, is unconstitutional, (2) to prevent the operation of a municipal liquor store by the village of Rogers to the exclusion of plaintiffs or other private interests, (3) an order directing the village of Rogers to commence appropriate action against the past and present members of its village council who voted to establish or continue operation of a municipal liquor store to recover the money illegally spent in operation of the municipal liquor store, and (4) to have it adjudged and decreed illegal for the village of Rogers to operate its municipal liquor store to the exclusion of plaintiffs or other private interests without first purchasing, as prescribed by Sec. 340.11, subd. 16, the stock, equipment, and other tangible personal property owned and formerly used by plaintiffs in their respective private liquor establishments.

Defendant, Village of Rogers, moved for summary judgment under Rule 56.02 of the Rules of Civil Procedure. The motion was granted, and plaintiffs appeal from the judgment entered pursuant to the district court's order granting defendant summary judgment.

Plaintiffs are citizens, taxpayers, residents, and freeholders of the village of Rogers, Hennepin county, Minnesota. For many years prior to June 30, 1950, they had been licensed by the village of Rogers to sell intoxicating liquor both "on sale" and "off sale" in that village. During this period plaintiffs operated orderly liquor establishments

and at no time committed any violation of existing liquor laws. On July 1, 1950, one day following the expiration of plaintiffs' licenses, defendant, by the authority granted in Secs. 340.07, subd. 5, and Secs. 340.11, subd. 10, commenced operation of an on- and off-sale municipal liquor store. Since that date the municipal liquor store has been the sole and exclusive liquor store in the village of Rogers.[1] Plaintiffs alleged in their complaint that for the period from July 1, 1950, to December 31, 1950, the municipal liquor store operated at a loss, the amount of such loss being substantially in excess of the $1,257.39 shown by the village of Rogers' own records. The complaint further alleged that the operating loss from January 1, 1951, to December 31, 1951, would be in excess of $5,000. Defendant by its answer admitted that its municipal liquor store operated at a loss for the period from July 1, 1950, to December 31, 1951, but it neither accepted plaintiffs' claim as to the amount of such losses nor made its own showing in this regard. Plaintiffs further alleged that, since no trunk highway runs through the village of Rogers, it is not a suitable location for a municipal liquor store and that any such store would operate at a loss to plaintiffs and other taxpayers. Since the establishment of the municiual liquor store, the village of Rogers has purchased a part of the stock of plaintiff Leo Arens for $3,000 but has failed and refused to purchase the other stock, equipment, and personal property owned and used by plaintiffs in their respective liquor stores in the village of Rogers prior to the commencement of operations at the municipal liquor store.

The case presented to us on appeal is a composite of two separate causes of action. One is essentially a taxpayers' class action seeking a declaratory judgment under the uniform declaratory judgments act, M. S. A. c. 555, as to the constitutionality of Secs. 340.07, subd. 5, and 340.11, subd. 10. The other is an action by plaintiffs as taxpayers and former liquor licensees in the village of Rogers seeking to prevent

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[1] M.S.A. 340.13 provides, *inter alia*, that no liquor license for private retail operation shall be issued in any municipality maintaining an exclusive municipal liquor store.

the operation of the municipal liquor store in the village of Rogers and to have it decreed, in any event, that operation of the exclusive municipal liquor store without compliance with Sec. 340.11, subd. 16, is illegal. Four main issues are raised for our consideration on appeal.

(1) Do plaintiffs have a sufficient legal standing to obtain a declaratory judgment regarding the constitutionality of Secs. 340.07, subd. 5, and 340.11, subd. 10?

(2) Are Secs. 340.07, subd. 5, and 340.11, subd. 10, invalid as special legislation prohibited by Minn. Const, art. 4, Sec. 33?

(3) Did the establishment of defendant's exclusive municipal liquor store deprive plaintiffs of their liberty and property without due process of law in violation of U. S. Const. Amend. XIV, and Minn. Const. art. 1, Sec. 7?

(4) Is Sec. 340.11, subd. 16, which requires municipalities establishing municipal liquor stores to purchase the stock, equipment, and other tangible personal property of private liquor establishments thereby divested of their business, constitutional?

While it appears from the memorandum of the trial court that other substantive and procedural questions were raised on the motion for summary judgment, only the foregoing questions need be considered in view of our disposition of the appeal.

1. The first question presented is whether plaintiffs have legal standing to obtain a declaratory judgment regarding the constitutionality of Secs. 340.07, subd. 5, and 340.11, subd. 10. Defendant correctly points out in its brief that one seeking a declaratory judgment regarding the constitutionality of a state statute must have a direct interest in the validity of that statute which is different in character from the interest of the citizenry in general. From this premise it argues (1) that being mere citizens, taxpayers, residents, and freeholders does not give to plaintiffs a sufficient interest, citing State ex rel. Smith *v.* Haveland, 223 Minn. 89, 25 N.W. (2d) 474, and (2) that a legal standing is not present by reason of their being the former holders of the last private liquor licenses issued in the village

of Rogers because liquor licensees have no vested right to renewal of their licenses and their status upon expiration of their licenses is indistinguishable from that of the public in general, citing Paron *v.* City of Shakopee, 226 Minn. 222, 32 N.W. (2d) 603.

The trial court, after considering the above arguments, concluded that this was a proper case for a declaratory judgment on the grounds that taxpayers as a class have an interest in such a proceeding as this, particularly where, as here, it is admitted that the operation of the municipal liquor store resulted in a financial loss to the community.

The undoubted rule in this state is that a justiciable controversy must exist before the courts have jurisdiction to render a declaratory judgment regarding the constitutionality of a statute. Hassler *v.* Engberg, 233 Minn. 487, 48 N.W. (2d) 343; State ex rel. Smith *v.* Haveland, *supra;* County Board of Education *v.* Borgen, 192 Minn. 512, 257 N.W. 92. As this court stated in the Smith case (223 Minn. 92, 25 N.W. [2d] 477):

> "Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing litigants. Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy. Although complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner."

Whether a taxpayer has a sufficient legal interest to entitle him to standing under the uniform declaratory judgments act (M. S. A. c. 555) to contest the constitutionality of legislative enactments has been considered previously by this and other courts. In Leighton *v.* City of

Minneapolis, 222 Minn. 516, 25 N. W. (2d) 263, this court held that a taxpayer could challenge, in proceedings for declaratory judgment, the constitutionality of a statute allowing cities of the first class with a population of 450,000 or over to levy an additional annual tax not exceeding five mills upon all the taxable property within the city to provide for medical facilities and care. In Almquist *v.* City of Biwabik, 224 Minn. 503, 505, 28 N. W. (2d) 744, 745, this court, in holding that a town taxpayer could contest the validity of a section of a city home rule charter providing that the town assessor assess city property and that he be paid therefor out of town funds, stated:

> "* * * The illegal diversion of funds raised by taxation to which the taxpayer has contributed gives rise to a justiciable controversy which may be determined by a declaratory judgment."

In Regan *v.* Babcock, 188 Minn. 192, 247 N.W. 12, this court held that payment of auto license fees and the state gas tax gave the taxpayers a substantial interest in the honest expenditure of the funds into which their taxes were paid so as to permit a taxpayer's suit to have paving and grading contracts declared void. Likewise, it has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds. Behrens *v.* City of Minneapolis, 199 Minn. 363, 271 N.W. 814; see, Oehler *v.* City of St. Paul, 174 Minn. 410, 417, 418, 219 N.W. 760, 763. See, also, 11 Minn. L. Rev. 278. While none of the latter cases involved actions under the uniform declaratory judgments act, they are illustrative of the attitude which has prevailed in this court concerning the interest of a taxpayer in the illegal expenditure of his tax dollar.

The right of a taxpayer to obtain a declaratory judgment with respect to the constitutionality of a statute providing for the levy of taxes or expenditure of public money has been generally recognized in other jurisdictions. Ethington *v.* Wright, 66 Ariz. 382, 189 P. (2d) 209; see, Danforth *v.* City of Yankton, 71 S. D. 406, 413, 25 N.W. (2d) 50, 54. See, also Riesenfeld, Bauman, and Maxwell, *Judicial*

Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota, 37 Minn. L. Rev. 1, 28.

We are of the opinion that the trial court properly concluded that plaintiffs' interest as taxpayers is sufficient to enable them to litigate the constitutionality of Secs. 340.11, subd. 10, and 340.07, subd. 5, in the present action. Taxpayers have a real and definite interest in preventing an illegal expenditure of tax money by a municipality. This is particularly true where, as here, the project being financed is a money-losing venture which will likely have the effect of increasing the over-all tax burden of the community. While this means of increasing municipal taxes is not as direct as where an ordinance or statute expressly calls for an additional levy of taxes, the effect is nevertheless as real. The case of State ex rel. Smith *v.* Haveland, *supra*, upon which defendant places particular reliance, is clearly distinguishable from the instant case. There the taxpayer's interest in having a statute exempting all moneys and credits from taxation declared unconstitutional was not a protectible legal interest which was about to be jeopardized but was merely on adademic interest in whether or not the particular tax exemption was constitutionally feasible.

In view of our opinion that plaintiffs may test the constitutionality of Secs. 340.07, subd. 5, and 340.11, subd. 10, as taxpayers in the present action, it becomes unnecessary to consider defendant's further argument with respect to this point.

2. The next question to be considered is whether Secs. 340.07, subd. 5, and 340.11, subd. 10, are unconstitutional by reason of the prohibition against special legislation contained in Minn. Const. art. 4, Sec. 33.[2] Section 340.07, subd. 5, states:

> " 'Exclusive liquor store' is an establishment used exclusively for the sale of intoxicating liquor, cigars,

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[2] "In all cases when a general law can be made applicable, no special law shall be enacted; * * *. The legislature shall pass no local or special law regulating the affairs of * * * any county, city, village, * * *. *Provided, however,* That the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated."

cigarettes, all forms of tobacco, non-intoxicating malt beverages and soft drinks at retail, either on sale or off sale, or both; provided, that lunches may be sold in a liquor store located in a village containing less than 500 inhabitants and situated in any county having a population according to the last federal census of not less than 34,000, nor more than 35,000, and having not less than 24, nor more than 25, full and fractional townships. It shall be under control of an individual owner or manager and, *if located in municipalities other than cities of the first, second, and third class, it may be owned and operated by the municipality as the governing body thereof shall direct.*" (Italics supplied.)

Section 340.11, subd. 10, provides:

"'On sale' licenses may be issued for the sale of intoxicating liquors in hotels, clubs, restaurants and establishments for the sale of 'On sale' liquors exclusively in cities of the first, second, and third class and villages of over 10,000 inhabitants, and in cities of the fourth class where such cities have a population in excess of 3,000 persons and are adjacent to cities of the third class. *Such licenses may be issued in cities of the fourth class, and other villages and boroughs for such sale of intoxicating liquor in hotels, clubs, or exclusive liquor stores, which exclusive liquor stores the governing body of such municipalities may establish or permit to be established for dispensation of liquor either 'On sale' or 'Off sale,' or both.* In cities and villages having over 5,000, and not more than 10,000, population the municipality may license 'On sale' in restaurants in lieu of the establishment of exclusive liquor stores." (Italics supplied.)

The precise question plaintiffs raise is the constitutionality of the action of the legislature in limiting the authority to establish municipal liquor stores to cities, villages, and boroughs of not over 10,000 population. Although plaintiffs do not question the power of the legislature to adopt a classification of municipalities based on population, it is

their contention that the division of municipalities on the basis of whether they have a population of over or under 10,000 is arbitrary and unreasonable when used in a law authorizing the establishment of municipal liquor stores.

Despite the limitations on special legislation contained in Minn. Const. art. 4, Sec. 33, the legislature is not prohibited from making certain classifications regarding the subjects upon which its enactments will operate. That the field of liquor control legislation is no exception is amply demonstrated in this court's opinion in George Benz Sons, Inc. *v.* Ericson, 227 Minn. 1, 10, 34 N.W. (2d) 725, 731, where this court said:

> "Conceding that the state has the power to control and regulate the sale of intoxicating liquors, it must also be conceded that in doing so it has the power to make necessary classifications."

Population has been one of the common types of classification employed by our legislature.[3] However, this method of classification, as is the case with all classifications involved in general laws, must meet certain standards in order to escape the constitutional prohibition against special legislation. This court has had frequent occasion to consider in detail the necessary requirements for a classification to be valid. See, Loew *v.* Hagerle Brothers, 226 Minn. 485, 33 N.W. (2d) 598; Hamlin *v.* Ladd, 217 Minn. 249, 14 N.W. (2d) 396. These requirements are well summarized in State ex rel. Youngquist *v.* Common School Dist. No. 78, 180 Minn. 44, 47, 230 N.W. 115, 116, as follows:

> "* * * For the purpose of a general law the legislature may adopt a proper classification of subjects upon which the law shall operate, and a law is general and uniform in its operation if it operates uniformly upon all subjects within a proper class. But the classification cannot be arbitrary or illusive, and must be

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[3] E.g., Leighton *v.* City of Minneapolis, 222 Minn. 516, 25 N.W. (2d) 263; Malmberg *v.* County of Hennepin, 156 Minn. 689, 194 N.W. 765; see, Dawley, *Special Legislation and Municipal Home Rule in Minnesota: Recent Developments*, 16 Minn. L. Rev. 659, 663.

> founded upon a substantial distinction, having reference to the subject matter of the legislation, between the objects or places excluded and those included. The distinction made must suggest the necessity or propriety of different legislation for each of the classes in reference to the subject of the legislation. The classification must be germane or related to the purpose of the law."

An exception to the necessity of compliance with these requirements is contained in Minn. Const. are. 4, Sec. 36.[4] Defendant contends that the classification in question comes within the fourth group, "cities of ten thousand inhabitants or less," provided for in art. 4, Sec. 36. If this were the case, the classification would be automatically constitutional and no inquiry would be necessary regarding the reasonableness of the classification contained in Secs. 340.07, subd. 5, and 340.11, subd. 10, nor its relation to the purpose of those statutes. It is our opinion, however, that art. 4, Sec. 36, has no application to the classification in question because the groupings in art. 4. Sec. 36, apply only to *cities*, whereas the classification in Secs. 340.07, subd. 5, and 340.11, subd. 10, groups cities of 10,000 and under population together with villages and boroughs of that same population.

Although it is for the courts to determine whether a particular classification is germane or relevant to the purpose of a statute, of necessity this is a field where the legislature is left a large area of discretion. As stated in State ex rel. Anderson *v.* Sullivan, 72 Minn. 126, 132, 75 N. W. 8, 9:

> "• • • The subject of classification by population is so largely a matter of policy, and the considerations which enter into it are so numerous and complex, that the legislature must necessarily be allowed a large dis-

[4] "• • • The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less, which shall apply equally to all such cities of either class, and which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for."

cretion in the matter; and the courts ought not to hold a statute invalid or special legislation unless it appears very clearly that the basis of classification adopted is purely arbitrary."

More recently in Eldred *v.* Div. of Employment and Security, 209 Minn. 58, 63, 295 N. W. 412, 415, this court said:

"* * * 'The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility.' "

The increasing tendency in recent years to uphold classifications arrived at by the legislature and the underlying reasons for this development are well summarized in 3 Dunnell, Dig. (3 ed.) Sec. 1678, as follows:

"* * * There has been a marked change in recent years in the attitude of the courts upon the question of proper classification for purposes of legislation. The present tendency is to leave the matter largely to the discretion of the legislature. This change is due to the greatly increased complexity of social and economic facts of modern times, calling for more complex and specific legislation. * * * When a classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, * * *."

Furthermore, every presumption is in favor of the constitutionality of a regularly enacted statute. State ex rel. Bd. of Education *v.* Brown, 97 Minn. 402, 405, 106 N. W. 477, 478.

In light of the foregoing considerations, our task in the instant case is to review the possible factors which likely could have motivated the legislature in drawing a line of demarcation between municipalities of under and over 10,000 population regarding the authority to set up a municipal liquor store. Plaintiffs, in support of their claims of unconstitutionality, set forth what they term the four rea-

sons most commonly advanced in support of municipal liquor dispensaries; namely, (1) simplification of the policing problem, (2) reduction of liquor consumption by elimination of the profit incentive, (3) minimization of the danger of political corruption, and (4) providing an additional source of municipal revenue. It is then argued that all these reasons apply with at least equal, if not greater force to justify the establishment of municipal liquor stores in cities and villages of over 10,000 population as in cities and villages of under 10,000 population. Assuming without deciding that plaintiffs' argument is true, it does not necessarily follow that the classification here was arbitrary and thus unconstitutional. Our task is not to appraise the desirability of what the legislature has done nor to decide what classification, if any, is the best, but is rather to determine whether there is any reasonable basis or justification for the classification adopted by the legislature. We are of the opinion that such a basis exists here. The legislature might reasonably have determined that facilities of the larger municipalities for policing private liquor establishments were likely to be more adequate than those of the smaller communities. As we recently stated in Cleveland *v.* County of Rice, 238 Minn. —, —, 56 N. W. (2d) 641, 645:

> "* * * In the case of liquor regulations, classification of areas on the basis of the amount of police supervision in the areas is common."

Furthermore, the legislature might also have concluded that municipal ownership is more feasible where the number of outlets is small and that, therefore, the privilege should not be extended to the large cities where many establishments would have to be operated. The legislature is not bound to cure all evil at once but rather may deal with it where it is practical to do so. Eldred *v.* Div. of Employment and Security, 209 Minn. 58, 295 N. W. 412.

We have been referred by the briefs of the parties and *amici curiae* to various Minnesota cases involving classification by population. They are, however, of very limited value in determining whether the particular classification in Secs. 340.07, subd. 5, and 340.11, subd. 10, is constitutional,

for each case in this area of the law must be determined on its own facts with respect to whether the classification is germane to the purpose of the law. Plaintiffs cite as controlling State ex rel. Paff *v.* Kelley, 235 Minn. 350, 50 N. W. (2d) 703, where a classification was found unreasonable and not germane which provided that the number of on sale liquor licenses shall be determined by the governing body in cities of the fourth class situated in a county having 100 to 110 townships and a population between 13,000 to 15,000. This case is clearly distinguishable on its facts and by the added element that only one city in the state conformed to such a classification.

3. Plaintiffs further contend that the refusal of the village of Rogers to renew their liquor licenses in order to establish a municipal liquor store deprived them of their liberty and property without due process of law in violation of U. S. Const. Amend. XIV, and Minn. Const. art. 1, Sec. 7.

The prevailing and sound view today is that the establishment of municipal liquor stores is a proper exercise of the police power of the state.[5] This court, although never before concerned with the precise question of whether municipal liquor stores are constitutional by reason of the police power, has previously discussed the constitutional theory underlying the establishment of publicly owned dispensaries. In Stabs *v.* City of Tower, 229 Minn. 552, 559, 40 N. W. (2d) 362, 368, this court said:

> "* * * Publicly owned liquor establishments are governmental agencies established in the exercise of the police power to accomplish governmental purposes. * * *
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> "That public ownership and operation of liquor establishments such as a municipal liquor store differs essentially from regulation of the liquor traffic by the licensing system is confirmed by the avowed purposes and objects of such publicly owned and operated liquor

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[5] State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487, 121 A.L.R. 283; Commonwealth v. Stofchek, 322 Pa. 513, 185 A. 840; City of Pierre v. Siewert, 63 S.D. 485, 261 N.W. 42; 30 Am. Jur., Intoxicating Liquors, Sec. 218. Contra, McCullough v. Brown, 41 S.C. 220, 19 S.E. 458.

stores. To begin with, it is said that publicly owned and operated liquor dispensaries (this applies to municipal liquor stores) are the outgrowth of dissatisfaction with the licensing system. * * * The intention is not only to depart from the licensing system, but to substitute an entirely different one for it. The thought is that government can more effectively control and regulate what it owns and operates than something which is privately owned and operated. * * * The regulation deemed necessary is to be achieved through ownership and operation rather than by policing."

See, also, Hahn *v.* City of Ortonville, 238 Minn. —, —, 57 N. W. (2d) 254, 260; 3 Dunnell, Supp. Sec. 4918a.

While plaintiffs do not quarrel with the unquestioned power of defendant to establish a municipal liquor store pursuant to the police power as a method of regulating the liquor business, it is their position that the village of Rogers established the municipal liquor store in question solely for revenue purposes. This they contend is not a reasonable justification for putting a person out of business and is violative of the due process clauses of both the state and federal constitutions. Thus they argue that the trial court erred in granting defendant summary judgment because they should be allowed at trial to produce evidence of the revenue seeking motives of defendant's village council in authorizing the municipal liquor store. However, in view of the well-established rule that the motives of a legislative body in enacting any particular legislation are not the proper subject for judicial inquiry, their position, in our opinion, is untenable. In holding that it was improper in an acton contesting the legality of an ordinance imposing an annual license fee of $200 upon a motion picture theatre to receive in evidence the admissions of individual members of the village council to the effect that the motive for enacting the ordinance was to obtain funds for a depleted village treasury, this court in Higgins *v.* Lacroix, 119 Minn. 145, 148, 137 N. W. 417, said:

"* * * Legislative acts would rest on insecure ground, indeed, if admissions of the individual legis-

lators that the attainment of a nonpermissible or unlawful end was the motive and purpose in enacting a law are to be received in evidence and be considered by the courts when called to pass on their validity. Discussions of lawmaking bodies when considering and enacting a law may, when the language is obscure and doubtful, be considered by the courts for the purpose of arriving at the true intent and meaning of the act, but manifestly it ought to be beyond the power of one who has been intrusted with authority to enact a law to impeach the same by any subsequent statement of secret or avowed motives entertained at the time of its passage that would work its invalidity. 28 Cyc. 375, 376.

"In Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 28 L. ed. 1145, it is said:

"'The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation considered with reference to the condition of the country and existing legislation.' An exception to this general rule may be found where an act or ordinance relates to a private contract and was passed to defraud. We conceive that the general rule just stated applies to ordinances of a municipality when they relate solely to the good order and government of the same. State v. City of Lake City, 25 Minn. 404."

This principal has more recently been reaffirmed by this court in Oscar P. Gustafson Co. *v.* City of Minneapolis, 231 Minn. 271, 276, 42 N. W. (2d) 809, 812. Hence, since evidence to show the council's motives would be improper, the allegation in plaintiffs' complaint concerning the council's motives could be given no weight in determining defendant's motion for summary judgment.

Even if the motives of defendant's village council could be questioned and it could be shown that the sole reason for establishing the municipal liquor store in the village of Rogers was for revenue purposes, it is very doubtful whether

liquor licensees whose licenses have lapsed at the time of the establishment of the municipal liquor store are deprived of any property without due process of law, for, as this court has frequently stated, no person has a vested property right to engage in or continue to engage in the liquor business. George Benz Sons, Inc. *v.* Ericson, 227 Minn. 1, 10, 34 N. W. (2d) 725, 730; Paron *v.* City of Shakopee, 226 Minn. 222, 32 N. W. (2d) 603.

4. The last question presented involves the constitutionality of Sec. 340.11, subd. 16, which provides as follows:

> "*No municipality shall engage in the sale of intoxicating liquors to the exclusion of private interests without first purchasing the stock, equipment and other tangible personal property of such private liquor establishments and reimbursing the private owner or owners for the property thereby divested or rendered unproductive therein by the act of such municipality in the creation of said municipal liquor store;* provided, that this subdivision shall not alter the act of any municipality in the past nor shall the same be retroactive as to property rights heretofore divested or rendered unproductive by any act of any municipality in the creation of a municipal liquor store prior to the passage of Laws 1945, Chapter 417. In the event that no agreement can be reached between said interested parties as to the value of the stock, equipment, and tangible personal property affected by said act of such municipality or other governing body, then, and in that event, the same shall be submitted to arbitration in accordance with the provisions of the Minnesota Statutes 1941, Chapter 572." (Italics supplied.)

The trial court, as evidenced by its findings of fact, conclusions of law, and order for judgment and its memorandum made a part thereof, specifically determined that this subdivision of the statute was unconstitutional. It was of the opinion that the italicized portion thereof violated Minn. Const. art. 9, Sec. 1, which provides that "Taxes * * * shall be levied and collected for public purposes, * * *."

The trial court reasoned that public funds expended for the purchase of the stock, equipment, and other tangible assets of private liquor dealers divested of their business by the establishment of a municipal liquor store are not expended for a public purpose and that, since the moneys required to finance such expenditures would have to be raised by taxes levied against the property of the residents of the municipality, Sec. 340.11, subd. 16, violated Minn. Const. art. 9, Sec. 1, and was, therefore, unconstitutional.

Defendant asserts the position adopted by the trial court. The question thus presented is whether the expenditures required by Sec. 340.11, subd. 16, are for a public purpose. If they are not, subd. 16 must be declared void and unenforceable.

It is well settled that the legislature cannot authorize or require the expenditure of public funds by a municipal subdivision of the state for any purpose not essentially of a public nature. Castner v. City of Minneopolis, 92 Minn. 84, 99 N. W. 361, 1 Ann. Cas. 934. Whether a given expenditure is for a public purpose may be determined by the courts. Behrens v. City of Minneapolis, 199 Minn. -63, 271 N. W. 814; Burns v. Essling, 156 Minn. 171, 194 N. W. 404; Castner v. City of Minneapolis, *supra.* An expenditure is illegal if the primary object is to promote a private purpose although incidentally some public purpose will also be served. Behrens v. City of Minneapolis, *supra;* Burns v. Essling, *supra;* 4 Dunnell, Dig. & Supp. Sec. 6585b.

No doubt the required purchase of stock, equipment, and other tangible personal property prescribed by Sec. 340.11, subd. 16, will benefit certain private liquor dealers who no longer can continue in business after the municipality has decided to go into that field. There is also reason to believe, as plaintiffs suggest, that a public purpose may be served by lessening resistance and resentment against the establishment of a municipal liquor store in a given municipality and by forcing the voters and elected officials thereof to be more responsible in their determination of whether or not to establish a municipal liquor store. It is, however, manifestly clear that the primary purpose of subd. 16 is to compensate the private liquor dealers who are put out of business rather than to benefit the public as a

whole. It may be advanced that the stock and equipment purchased from the private liquor dealers can be put to good public use in the proposed municipal liquor store and that, therefore, the expenditures pursuant thereto are for a public purpose. This argument, however, ignores the fact that by Sec. 340.11, subd. 16, the municipality is required to buy all the stock, equipment, and other tangible personal property of such private liquor establishments irrespective of whether the municipality has any need for their use or not.

Plaintiffs argue that, aside from the traditional benefit-to-the-public concept of public purpose, the courts have recognized that a public purpose may be served by satisfying a moral obligation owed to private individuals. In our opinion, if it is possible to justify the expenditures provided for in Sec. 340.11, subd. 16, it must be on this basis. This court has frequently stated that the legislature may satisfy an obligation which is not legally binding but which, nevertheless, has a basis in justice and equity.[5] The typical situations in which courts have found a moral obligation are where labor or materials have been furnished to, or utilized for the benefit of, the state or municipality without compensation;[6] where someone has been injured through the act or negligence of a public officer; or where states have authorized soldier bonuses or fireman benefits.[7] No moral obligation, however, was found to justify the reimbursement of a defeated alderman for expenses incurred in an election recount in Castner v. City of Minneapolis, *supra*, or to justify the payment of bounties to sugar beet manufacturers who relied on an unconstitutional statute in Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454. We have neither found nor been referred to any case which recognizes a moral obligation in a situation such as that presented here.

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[5] White v. State, 215 Minn. 609, 614, 11 N.W. (2d) 151, 154; State ex rel. Wharton v. Babcock, 181 Minn. 409, 232 N.W. 718; Fuller v. County of Morrison, 36 Minn. 309, 30 N.W. 824.

[6] Fuller v. County of Morrison, *supra;* City of Minneapolis v. Janney, 86 Minn. 111, 90 N.W. 312. The additional element of reliance on proposed municipal action was present in the Janney case.

[7] See, Annotation, 172 A.L.R. 1407, and, also, 18 Minn. L. Rev. 360.

Plaintiffs cite the cases of Earle v. Commonwealth, 180 Mass. 579, 63 N. E. 10, and Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 43 S. Ct. 684, 67 L. ed. 1167, as controlling on this point. In the Earle case a practicing physician's business was damaged by the fact that the city took over certain lands and buildings under the power of eminent domain. Included in the acquisition was the building in which the doctor maintained his office. The court allowed compensation for the damage to the doctor's business on the theory that the legislature is not forbidden from being just even though the form of property damaged was not the kind for which compensation could be required under the power of eminent domain. In the Joslin Mfg. Co. case, a Rhode Island statute authorizing the city of Providence to obtain a pure water supply including a provision that the city could condemn land under eminent domain and compensate owners for damage to their business and also enable the business to move to other New England states without cost. Under an attack of deprivation of due process and denial of the equal protection of the laws the supreme court upheld the statute on grounds that the legislature can extend the principal of just compensation to an extent consistent with equity and justice.

Both of these cases, however, are distinguishable from the situation presented here. In both cases compensation was granted in recognition of the harm resulting to a business which had every right to continue operating and serving the public at the time of the injury. A private liquor dealer, on the other hand, has no vested right to continue selling intoxicating liquor. George Benz Sons, Inc. v. Ericson, *supra;* Paron v. City of Shakopee, *supra.* As Mr. Justice Field said in Crowley v. Christensen, 137 U. S. 86, 91, 11 S. Ct. 13, 15, 34 L. ed. 620, 624:

> "* * * There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent

of regulation rest in the discretion of the governing authority."

In Anderson v. City of St. Paul, 226 Minn. 186, 32 N. W. (2d) 538, and State v. Hosmer, 144 Minn. 342, 175 N. W. 683, this court expressed views in full accord with those stated in the Crowley case. What we recently said in Cleveland v. County of Rice, 238 Minn.——, ——, 56 N. W. (2d) 641, 644, with reference to the sale of non-intoxicating malt liquors is equally applicable to the sale of intoxicating liquors:

> "* * * The sale of nonintoxicating malt liquors has always been subject to public control. The license to sell such beverages is not a property right but is in the nature of a privilege, and, as such, subject to reasonable regulations. * * * The disadvantage of most 'privileges' is that to obtain them one must give up certain 'rights.'"

The cases which have upheld the right of the legislature to recognize a moral obligation in compensating the owners of animals destroyed by the authority of the police power as a health measure are not in point.[8] In those cases compensation was made for the destruction of definite and certain private property sacrificed for the greater public interest, whereas any payment to private liquor dealers to lessen the loss caused by the nonrenewal of their liquor licenses is compensation for the termination of an interest or privilege inherently speculative and uncertain as to value and duration.

While bearing in mind that every presumption is in favor of the constitutionality of a regularly enacted statute and the corollary rule which states that any doubt as to the existence of a moral obligation must be resolved in favor of the action of the legislature,[9] it is, nevertheless, our con-

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[8] Payne v. Jones, 47 S.D. 488, 199 N.W. 472; Kilpatrick v. Compensation Claim Board (Tex. Civ. App.) 259 S. W. 164 (moral obligation owed to persons prevented from planting cotton in certain areas by laws enacted to prevent spread of the pink boll worm).

[9] Fuller v. County of Morrison, 36 Minn. 309, 30 N. W. 824.

sidered opinion that no obligation, legal or moral, is owed to private liquor dealers foreclosed from continuing their business as a result of the establishment of a municipal liquor store. Section 340.11, subd. 16, makes no requirement that a loss be shown before purchase of the items therein specified is required. It can be argued that, in spite of this fact, Sec. 340.11, subd. 16, is not providing compensation in an amount greater than the possible loss to be suffered but is in effect only protecting against any loss which the private liquor dealer might suffer by not being able to sell his obsolete stock, equipment, and other tangible personal property. Nevertheless, it is extremely difficult to rationalize a moral obligation to protect against possible future loss as distinguished from a moral obligation to compensate for a loss already suffered. Although strong and compelling reasons can be advanced for finding a moral obligation to reimburse the ordinary businessman for losses sustained as a result of governmental action, such reasons do not apply with equal weight to a trade as tenuous as the retail hard liquor business in this state. How can there be a moral obligation to compensate a business traditionally unfavored by society which is commenced merely at the will of the sovereign and subject to its discretion and control throughout the whole of its existence? It is inconceivable to say that any moral obligation would be owed a private liquor licensee whose license was not renewed upon its normal expiration. Yet there is no substantial difference, in our opinion, between such a case and the purchases required by Sec. 340.11, subd. 16.

In view of our conclusion that Sec. 340.11, subd. 16, is unconstitutional, it becomes unnecessary for us to pass upon any of the other questions presented in the briefs at this time.

It follows that the trial court properly granted defendant's motion for summary judgment and that the judgment appealed from should be affirmed.

Affirmed.

Mr. Justice Thomas Gallagher took no part in the consideration or decision of this case.

APPENDIX "B"

(Memorandum Opinion of Minnesota District Court)

MEMORANDUM

The case is important, not only to the parties immediately concerned, but to many people throughout the State of Minnesota in that it raises the question of the constitutionality of Section 340.07, Subdivision 5, and Section 340.11, Subdivision 10, M. S. A., insofar as such sections grant to municipalities of certain classifications the right to establish exclusive municipal liquor stores.

So far as the Court has been advised or been able to find, this has never been passed upon by our Supreme Court, and apparently was raised only once before in a district court. In that case, *Bolier, et al. v. City of Robbinsdale, Hennepin County District Court File No. 457162,* Hon. D. E. LaBelle held as we hold here that the provisions of these two sections were constitutional.

In addition, it raises again the question of the constitutionality or enforceability of Section 340.11, Subdivision 16, M. S. A., by which the legislature sought to place upon municipalities that desire to establish a municipal liquor store, where privately owned liquor stores had theretofore been in existence, the burden of purchasing the stock, equipment and tangible assets of those liquor stores.

This second portion has been passed upon by several district courts in the state, all adversely to the claim of the plaintiffs herein, but so far as this Court is advised has not yet been passed upon by our Supreme Court.

The first question which is submitted and argued fully in the briefs, by all the parties, is whether this is a proper action for declaratory judgment, which is sought in the plaintiffs' first cause of action as stated in the complaint, questioning the constitutionality of Section 340.07, Subdivision 5, and Section 340.11, Subdivision 10, M. S. A.

All briefs in support of defendant's position have argued this point and rely strongly upon *State ex rel. Smith v. Haveland,* 223 Minn. 89, in support of their contention that this is not a case which is proper for the Court to determine

by declaratory judgment, on an action by persons in the position of the plaintiffs here.

The Court has read that case very carefully, and is of the opinion that the illustrations given in Section 3 of that decision by Justice Mattson indicate that a declaratory judgment is proper here. In that case the relator sought to force the County Auditor of Ramsey County to assess a Monies and Credits Tax against him. The Legislature had abolished Monies and Credits as a form of taxation. The Supreme Court held that there was no relief to which he was entitled and nothing on which a declaratory judgment could be based, he having no interest which would warrant it.

This would be true also in this case if the action were brought by the plaintiffs here for such relief only as citizens who have been refused the renewal of their liquor licenses. However, they bring this first cause of action, and allege in their complaint that they bring it, as citizens and taxpayers on behalf of themselves and all others similarly situated—in other words, a class action.

In view of the undisputed fact that taxpayers may have an interest in such a proceeding, particularly where, as here, it is admitted that the operation resulted for a year and a half in a financial loss to the community, it seems to this Court that it is a proper case for a declaratory judgment.

Of greater doubt, however, in the Court's mind, is the question of whether the plaintiffs can properly join in one action a representative suit or a class suit where a declaratory judgment is proper, with an action to redress a claimed private wrong, such as they claim in their second cause of action. There are really two causes of action set forth in the complaint.

Ordinarily the Court can see many difficulties which might arise in situations where this was attempted. However, here in view of the position which the Court takes in the matter, it is the opinion of the Court that it can be determined in this action and should be on the motion submitted.

In addition to these points, there is the question of whether the motion for summary judgment under Section

56.01 of the Rules of Civil Procedure, as brought here, is a proper method of arriving at the questions involved, or whether the motion should not have been made under Rule 12.02, Subdivision 5, for failure to state a claim upon which relief could be granted. The Court has gone over carefully the many cases in respect to this matter under the Federal Rules and is convinced that possibly in this situation a motion under Rule 12.02, Subdivision 5, would have been a better method of arriving at what is sought here.

However, all parties at the oral argument agreed that what they wished determined were the legal questions involved; i.e., the constitutionality of Section 340.07, Subdivision 5, Section 340.11, Subdivision 10, and 340.11, Subdivision 16, M.S.A., and submitted it on that basis, so that motion for summary judgment under those circumstances will reach the desired result as well as the motion under Rule 12.02, Subdivision 5.

The Court is also well aware that it is not necessary and very often would be surplusage to make Findings of Fact as it has done here. However, as the Court reads the cases under rules, there is discretion in the matter, and the Court feels that in this case Findings and Conclusions are indicated. It has therefore adopted that method of procedure.

Now, as to the basic questions involved. First, plaintiffs contend as citizens, taxpayers, freeholders, etc., that Section 340.07, Subdivision 5, and Section 340.11, Subdivision 10, M.S.A. are unconstitutional.

By their complaint the plaintiffs apparently base this contention on a number of grounds, which although not entirely clear, appear to be as follows:

(a) The operation of a municipal liquor store "is not an exercise of or a proper exercise of the police power or any other power of government;"

(b) That "it has no relation to public health, wealth or welfare;"

(c) That "it is special legislation insofar as it grants the power to some municipalities but withholds it from others," prohibited by Minnesota Constitution, Article IV, Section 33 and 34;

(d) That it violates the "internal improvements" clause of the Minnesota Constitution, Article IX, Section 5;

(e) That it violates the privileges and immunities clause of the Federal Constitution; and

(f) That it permits defendant to deprive plaintiffs of property without due process of law, and permits defendant to take property for public use without just compensation.

While all of these grounds seem to be suggested by Paragraph XII of the complaint, the Briefs on behalf of plaintiffs argue only (a), (c) and (d). In fact, only (c) and (d), except for a statement without supporting argument or authority as to (a), and so under well recognized principles this Court assumes the abandonment of the other claims by plaintiffs. This of course would follow as to (b) and (f), and probably also as to (e) almost as a matter of course, if the Court finds no violation of (a) in the statutory provisions in question.

1. "Is the operation of a municipal liquor store a proper exercise of police power?"

While there has been no Supreme Court decision in this state which directly passes upon the constitutionality of this section, it seems clear to the Court that this question has been answered by our Supreme Court in the case of *Stabs* v. *City of Tower, 229 Minn. 552,* where the Court said:

> "Publicly owned liquor dispensaries, including municipal liquor stores, are established pursuant to statutory authorization. . . . Publicly owned liquor establishments are governmental agencies, established in the exercise of police power to accomplish governmental purposes." p. 559

Further in discussing the theory of publicly owned dispensaries (municipal liquor stores here) the Court says:

> "That public ownership and operation of liquor establishments such as a municipal liquor store differs essentially from regulation of the liquor traffic by the licensing system is confirmed by the avowed purposes and objects of such publicly owned and operated liquor stores. To begin with, it is said that publicly owned

and operated liquor dispensaries (this applies to municipal liquor stores) are the outgrowth of dissatisfaction with the licensing system. . . . The intention is not only to depart from the licensing system, but to substitute an entirely different one for it. The thought is that government can more effectively control and regulate what it owns and operates than something which is privately owned and operated. For example, in Commonwealth v. Stofchek, 322 Pa. 513, 520, 185 A. 840, 845, the court said that under the state liquor store system the state could 'exercise a greater measure of control than was possible under the former system (of licensing).' Similar views are expressed in other cases. The regulation deemed necessary is to be achieved through ownership and operation rather than by policing."

While the constitutionality of these sections was not in question in this case, but rather the question of the tort liability of municipally owned liquor stores, this would seem to settle clearly that our Supreme Court considers these sections, authorizing municipal liquor stores, a proper exercise of police power.

Of similar effect is the decision in the case of *Paron* v. *City of Shakopee, 226 Minn. 222.*

"It is elementary that the legislature has the power to regulate the sale of intoxicating liquors. This power may be delegated to municipalities to license and regulate the sale of intoxicating liquors as an exercise of the ordinary police power of the state. The power to license involves the power to refuse to license, to limit the number of licenses to be granted, and to prohibit sales by persons not licensed." p 226

Here again the constitutionality of these sections was not involved, but our Supreme Court did recognize the whole Liquor Control Act, M.S.A. 340.07 to 340.40, as a proper exercise of the police power of the state. A long list of judicial decisions in other states, particularly where state liquor dispensaries have been involved, indicates that

this is the general rule throughout the United States. Many of these are cited in the Stabs case, supra, p 559, 560. Others are *City of Pierre* v. *Siewert, 63 S.D. 485; 261 N.W. 42,* involving a municipal liquor store act; *Ajax* v. *Gregory, 177 Wash, 465; 32 P. (2d) 560.*

There is no question as to the power of a state to regulate the sale of intoxicating liquor, and such power may include the power to prohibit the sale of liquor within a state. *Paron* v. *City of Shakopee, supra; Mugler* v. *Kansas, 123 U.S. 623.* This power to prohibit must of necessity include the power to adopt lesser degrees of regulation, such as state monopoly, or delegating that power to lesser governmental subdivisions, as in this case, certain villages and cities as set forth in the statutory provision. *City of Duluth* v. *Cervany, 218 Minn. 511.*

2. Having determined that the sections in question are a proper exercise of "police power," it of course follows that there can be no violation of the "internal improvements" clause of our State Constitution, Article IX, Section 5. *Erickson* v. *King, 218 Minn. 98.* This case involved the Metropolitan Airports Commission Act, and cites *Rippe* v. *Becker, 56 Minn. 100,* relied on by plaintiffs as in support of its holding. It holds that the "internal improvements" clause does not apply to "works used by the State as a sovereign in the performance of its governmental function." *Central Lumber Co.* v. *City of Waseca, 152 Minn. 201,* involving the establishment of a municipal fuel yard is to the same effect.

The second case relied on by plaintiffs in support of this contention is *Ohio* v. *Helvering, 292 U.S. 368.* This case, while it contains language supporting plaintiffs' position, is overruled in that respect in *N.Y.* v. *U.S., 326 U.S. 572.*

3. The final contention argued on behalf of plaintiffs in their briefs is that these sections are "special legislation insofar as they grant the power to some municipalities but withhold it from others," under Article IV, Sections 33, 34 and 36 of the Minnesota Constitution.

Article IV, Section 36, specifically permits classification on the basis of poulation as to cities, and our Court has

recognized such a basis as proper where applied to other governmental subdivisions.

State ex. rel. Anderson v. Sullivan, 72 Minn. 126. This case involved the constitutionality of a law passed in 1895 before the adoption of Section 36, and the Court there says:

(Justice Mitchell)

> "We have held that cities may be classified according to population . . . This is equally true as to counties. There can be no doubt that population is a proper basis for classification of cities and counties with reference to the salaries or compensation of city or county officers. If the act under consideration had been made applicable to all counties having a population of not less than 100,000, it would be hardly contended that the basis of classification was not proper.
>
> "The only thing that could cast any possible doubt on the propriety of the basis adopted in this act is the fact that it excludes from the class counties having more than 185,000 inhabitants. It is urged that this is an arbitrary classification, not founded upon any apparent natural reason suggested by a difference between the situation and circumstances of the counties included and those excluded from the class, or which suggests the necessity or propriety of different legislation with respect to them. The subject of classification by population is so largely a matter of policy, and the considerations which enter into it are so numerous and complex, that the legislature must necessarily be allowed a large discretion in the matter; and the courts ought not to hold a statute invalid or special legislation unless it appears very clearly that the basis of classification adopted is purely arbitrary." pp. 131, 132.

Malmberg v. Henn. Co., 156 Minn. 289.
Hamline v. Ladd, 217 Minn. 249.
State ex. rel. Board of Education v. Miner, 79 Minn. 201.
State v. Rogers, 97 Minn. 445.

Clearly neither the State nor Federal Constitutions preclude such classifications if it is reasonably suited to the

purposes of the legislation, if it is germane, if it aids in control and regulation. *Geo. Benz Sons, Inc. v. Erickson*, 227 Minn. 1.

> "Conceding that the state has the power to control and regulate the sale of intoxicating liquors, it must also be conceded that in doing so it has the power to make necessary classifications. 'The exercise of the legislative process necessarily involves classification.'" p. 10.

The classification basis for these Sections, based as it is on population alone, must be held proper, therefore, if germane, and it would seem clearly to be germane, realizing as we must that this is an exercise of "police power." At least no Court would say that it was an unreasonable basis of classification which the legislature has adopted.

This leaves only the question of whether it is "uniform in its operation."

Does it fail in this respect because it allows "local option," and thus some municipalities within the class may adopt the plan and others may not? Plaintiffs rely on

State v. Copeland, 66 Minn. 315.
Nichol v. Walter, 37 Minn. 264.
State v. Cooley, 56 Minn. 540.
Lodoen v. City of Warren, 146 Minn. 181.

These cases do support plaintiffs' contention. More recent cases, although not expressly overruling those above cited, hold differently. Almost the exact situation here involved was held constitutional in *State ex. rel. Benson v. Peterson*, 180 Minn. 366, involving a statute giving certain municipalities the right to establish a "Firemen's Civil Service Board" on affirmative action by the common council of any city or village in the class mentioned wishing to avail itself of the plan. In that case the four cases relied by plaintiffs as above cited are all discussed, criticized, and to a certain extent distinguished, if not expressly overruled, and our Supreme Court held definitely that the provision requiring a resolution by the council accepting the provisions of the Act did not make the Act unconstitutional as not uniform in application.

To the same effect, but even more specific in its language is *Naeseth* v. *Village of Hibbing, 185 Minn. 526,* where an act providing for a police Civil Service Board in certain municipalities where adopted by the common council was claimed to be unconstitutional as special legislation.

The Court says:

> "There is no constitutional objection to the law simply because it allows wide play to local self-government or because it does not cover as much territory as it might . . . As to equality or uniformity of operation, it is enough that a law operates uniformly within its scope. This statute plainly meets the test. It is not mandatory, but only an enabling act granting specified powers. It makes no discrimination in its bestowal of power. There is no objection on constitutional grounds that some grantees of statutory power do not see fit to exercise it or that they will not all use it in the same manner and with identity of effect." pp. 529, 530.

This has also been the uniform holding of our Supreme Court in respect to local or county option laws. *State* v. *Stoffels, 89 Minn. 205; State ex rel. Smith* v. *City of International Falls, 132 Minn. 298.* Thus the modern or present rule in Minnesota is clearly that an "option" provision does not invalidate such a law if it is otherwise uniform in its application. Certainly these Sections do so operate.

It is therefore the opinion of this Court that Sections 340.07, Subdivision 5, and 340.11, Subdivision 10, M.S.A., insofar as they grant the right to certain municipalities to create exclusive municipal liquor stores are a proper exercise of police power, are not in violation of the "internal improvements" clause of our Constitution, and are not "special legislation," nor in violation of any other constitutional provision, State or Federal.

Second, defendant contends that as to the plaintiffs' second cause of action for personal recovery for failure of the defendant to purchase their stock, fixtures and tangible assets, that Section 340.11, Subdivision 16, M.S.A. is unconstitutional; that even though not held to be unconstitutional,

that the defendant has not violated the provisions thereof; and finally that the complaint fails to state a cause of action for relief under the Section, if constitutional. As indicated in the Findings, the Court feels that on all grounds the defendant's position is correct.

This matter, while not passed upon by the Supreme Court of this State, has been before a number of our district courts, twice in this district. In the first of these cases, *Bolier* v. *City of Robbinsdale, Hennepin County District Court File No. 458764*, Hon. A. W. Selover sustained a demurrer to the complaint, holding in the memorandum filed with it, directly and unequivocally, that this subdivision was unconstitutional, but also holding, as this Court has, that the law had not been violated even though it were held to be constitutional.

In the second case in this district (really the first one to come before the court in point of time), *Bolier, et al*, v. *City of Robbinsdale, District Court File No. 457162, supra*, the Court held that all questions raised with reference to Section 340.11, Subdivision 16, were premature, after sustaining the constitutionality of the other two sections here involved.

In the third district court case, involving this statute, brought to the attention of this Court, *J. A. Carlson* v. *The Village of Walker*, the Hon. Graham M. Torrance of the 15th Judicial District held that under similar circumstances there had been no violation of the section.

While no case has been brought as yet to the attention of the supreme Court of this state involving these questions, this Court would naturally follow, if possible, such former district court holdings. Feeling as it does that these decisions are sound and proper, there is no difficulty in so doing.

As to the first question, the constitutionality of the Section, it seems to this Court that this Section, providing as it does that "no municipality shall engage in the sale of intoxicating liquors to the exclusion of private interests, without first purchasing the stock, equipment and other tangible personal property of such private liquor establishments and reimbursing the private owner or owners for the

property," etc. is a violation of Article IX, Section 1, of our State Constitution, which provides that ". . . taxes . . . shall be levied and collected for public purposes."

In order to pay the plaintiffs the money which they may claim under this statute for their stock, fixtures and tangible assets, it must of course be raised by taxes to be levied against the property of the residents of the village. It is fundamental that public funds can only be expended for public purposes, and that courts may determine whether expenditures are for such purpose. *State* v. *Foley, 30 Minn. 350; Coates* v. *Campbell, 37 Minn. 498; Castner* v. *City of Minneapolis 92 Minn. 84; Deering* v. *Peterson, 75 Minn. 118; Behrens* v. *City of Minneapolis, 199 Minn. 363; Burns* v. *Essling, 156 Minn. 171.* Nor can the legislature either authorize or require such expenditures. *Castner* v. *City of Minneapolis, supra.*

It is quite plain that the legislature had in mind the hardships which might befall the private liquor dealer who could no longer continue in business, after the municipality had decided to go into that field. Primarily the statute is for the benefit of those private liquor dealers.

It is difficult to see how any public benefit can arise to the Village of Rogers by forcing it to buy and pay for this personal property, formerly used in the liquor businesses of the plaintiffs, without any chance to buy on the open competitive market, and without any regard to the question of whether such personalty was usable or needed in the new operation. Such a provision is in contravention of the general policy of the state which requires purchases larger than a given amount to be on open competitive bids, and in a competitive market. While the Village of Rogers might have chosen to buy stock, and did buy some of the stock of one of the plaintiffs here, it should not and cannot in the opinion of this Court be compelled to buy and pay for something that it does not want, or cannot use, for the simple purpose of protecting the interests of the former liquor dealers, who it has been held, quite generally, have no vested or property rights in the renewal of their licenses or to continue in such business. *Paron* v. *City of Shakopee, supra.*

There were two private liquor stores involved in this case. In some locations there might be more. It is not a law which requires the condemnation of the property under eminent domain, nor can it be. The law does not require the former licensees to sell this personal property to the Village. In fact, there is nothing in the complaint here that would indicate, except by inference, that the plaintiffs had even offered to sell the property involved to the village.

Plaintiff's most effective argument as to the constitutionality of the Section is that it simply imposes a limitation or condition precedent on a grant of right to the municipality desiring to operate a liquor store. Here, of course, the plaintiffs are in the anamolous position of attacking the constitutionality of that provision in the same action where they raise this particular question. However, the Court is firmly convinced that the better law is that an unconstitutional condition may not be placed in the law, either as a condition precedent or subsequent, and the law remain constitutional. Both the plaintiffs and the Attorney General in their briefs stress this point.

The Attorney General cites *Monaghan* v. *Armitage, et al., 218 Minn. 108,* and the plaintiffs rely on *Abeln* v. *City of Shakopee, 224 Minn. 262,* in support of this position.

A careful reading of the *Monaghan* case fails to indicate any support for such stand. While the *Abeln* case has some language tending to support plaintiffs' arguments, it is not decided on that ground. In fact, the decision is directly that the statute in question there, violated no constitutional provision, State or Federal. While the question is not without doubt, we follow the general rule as laid down in Prof. Rottschaefer's Hornbook on Constitutional Law, 1939, Section 255.

> "A state may not enforce regulations or impose burdens, which it is constitutionally prohibited from enforcing or imposing directly, by conditioning the grant of privileges which it is free to grant or withhold on compliance with or the acceptance of such regulations or burdens."

In more detailed discussion of the question, Prof. Rottschaefer says:

> "It may, therefore, be taken as established that a regulation that would violate a given provision of the federal Constitution if directly imposed will violate that same provision if sought to be imposed as a condition to the grant of a privilege which the state is free to grant or withhold. The doctrine of these cases is not that the imposition of such unconstitutional conditions violates the due process clause, but that it violates the same constitutional provision that would be violated if the conditional regulation were sought to be imposed directly and unconditionally." p 557.

The power of the legislature in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. Whether the condition is a condition precedent or subsequent makes no difference in the application of the rule. *Frost* v. *Railroad Commission of California, 271 U. S. 583.*

As to the second position of the defendant, that even though this statute were held to be constitutional, there has been no violation of it, Judge Selover also covered that point in his memorandum and sustained the position here taken by the defendant in that respect also. In his case there had been a lapse of several months between the refusal to renew the licenses of the old liquor establishment by the Robbinsdale Village Council and the establishment of the municipal liquor store, but the reason given at the time the licenses were not renewed was that the municipality contemplated the establishment of a municipal store. Here only one day elapsed, and the reason was the same.

The plaintiffs' licenses in this case, as the *Robbinsdale* case, had lapsed and their renewal had been refused by the City Council of the Village of Rogers. The plaintiffs were no longer licensees but had merely the status of any citizen of the village who had applied for and not received a license. *Paron* v. *City of Shakopee, supra; State* v. *Hovorka, 100 Minn. 249; Abeln* v. *City of Shakopee, supra.*

As stated in the *Paron* case,

> "A prior expired license has fulfilled the purpose of its creation and is, therefore, of no further value nor effect. Unless the statute entitles the licensee to a renewal upon compliance with certain conditions, such an expired license confers no right upon the former licensee. There is nothing in the liquor laws of this state upon which the right to renewal can be premised."

In other words, a liquor license to a private individual in this state is not in any sense of the word a franchise, and no rights accrue under it, except the right to operate a liquor store during the term of the license, in accordance with the provisions of state and local law.

Thus, the plaintiffs in this case have no rights to protect and no status which would enable them to obtain relief. This question was also passed upon by Hon. Graham M. Torrance of the 15th Judicial District in this state in the case of *J. A. Carlson* v. *Village of Walker, supra.* The statute attempts to require the municipality to buy the tangible personal property of such "private liquor establishments." Judge Torrance, pointing out the holding of the *Paron* case and the general holding in this state, ruled in this matter that the plaintiff had no "private liquor establishment" after the expiration of their license, and that there is nothing in the law that requires, even assuming it to be constitutional, that a municipality before establishing a municipal liquor dispensary must purchase the stock, equipment and other tangible property of those who formerly had a liquor license, but who are out of business and had no "private liquor establishment."

This might seem to be a specious argument, and in this case where the time was only one day it might be so claimed with considerable force. However, assuming that as in the *Robbinsdale* case, decided by Judge Selover, there was a three or four month period, or that there might be a longer lapse of time, a year or even more, during which no liquor establishments were allowed in the municipality, and then the municipality decided to enter into the business on its own. If it is to be held, as it certainly should be held, that under such circumstances the municipality was perfectly

within its rights in refusing to issue licenses, and later deciding to enter into the business without any obligation to purchase something which was no longer in existence and hadn't been for some considerable period of time, what is the difference in a one day lapse as here?

Finally, in this particular case, the allegations of the complaint fall far short of stating a cause of action, even assuming that the statute under discussion is constitutional and enforceable.

Paragraph VIII alleges that the municipality did not buy, except a part of the stock of plaintiff Leo Arens, and fails and refuses to purchase the stock and equipment of the plaintiffs and each of them. By inference it might be taken from this allegation that the plaintiffs were willing and had offered to sell to the defendant their stock, equipment and other tangible personal property, although there is no direct allegation to that effect.

Paragraph IX sets forth that the value of the stock, equipment and other tangible personal property is in excess of $10,000 for each plaintiff. It does not allege that there is any loss incurred to the plaintiffs. It does not appear whether the plaintiffs had sold or made any effort to sell or dispose of such stocks, or made any attempt to minimize the damages, if any, to which they might be entitled.

The pleadings do not in the opinion of the Court, even assuming the statute is constitutional and enforceable, set forth a claim under which the plaintiffs would be entitled to recover for a private wrong.

It is therefore the opinion of this Court that Section 340.11, Subdivision 16, M.S.A., is unconstitutional; that even though held to be constitutional no violation is shown here nor could be claimed under similar circumstances; and finally that even though held constitutional and enforceable under the circumstances set forth here, the complaint in this case does not set forth a valid claim for recovery.

Let this memorandum be attached to and made a part of the Findings of Fact, Conclusions of Law and Order for Judgment herein.

(S.) Harold N. Rogers.

No. 652. ARENS ET AL. *v.* VILLAGE OF ROGERS. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The appeal is dismissed for the want of a substantial

*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which orders are this day announced.